

BANKING ALERT

[Foreclosure Debtors Lack Standing To Challenge Violation Of Pooling And Servicing Agreements](#)

In defending against mortgage debtors' consumer fraud, Fair Debt Collection Practices Act ("FDCPA") and other foreclosure defense claims, banks and mortgage holders often find themselves responding to alleged violations of Pooling and Servicing Agreements, which govern the securitization of mortgage loans. In *Wells Fargo Bank, N.A. v. Berteau*, No. 2:13-CV-7232 SRC, 2014 WL 5813704 (D.N.J. Nov. 10, 2014), the District Court of New Jersey held that foreclosure debtors do not have standing to challenge a violation of lenders' Pooling and Servicing Agreements and that not every perceived error in the transfer of a mortgage loan constitutes consumer fraud recoverable by the borrower. The debtors had asserted counterclaims against the bank for alleged violations of the Consumer Fraud Act ("CFA") and the FDCPA based on the bank's alleged failure to provide basic information on the loan's history, including the amount the debtors owed. (The debtors asserted that since they never received any such information, they did not "know" who owned their mortgage debt.)

The Consumer Fraud Act (CFA)

A debtor seeking to sustain a cause of action under the CFA against a bank or mortgage servicer must allege the following elements: (1) an unlawful practice by the bank; (2) an "ascertainable loss" by the debtor; and (3) a causal nexus between the two. In federal court, CFA plaintiffs must meet the heightened pleading standard under the federal rules, which require plaintiffs to specify the "who, what, where and why," of the alleged unlawful conduct, that which "would accompany the first paragraph of any newspaper story." The Court held that the debtors failed to specify what exactly Wells Fargo did, or failed to do, to violate the law.

The debtors' most specific allegations pertained to a Pooling and Servicing Agreement ("PSA"), which governed the securitization of their mortgage loan. The Court found that the debtors' alleged violation of the PSA failed for two reasons: (1) the debtors failed to specifically assert precisely what conduct violated the PSA; and (2) more importantly, the debtors lack standing to challenge a violation of lenders' PSA. The Court explained that even if the debtors had standing, a "defense against foreclosure does not

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necessarily state a CFA violation.” “In other words, not every error in the transfer of a mortgage loan constitutes consumer fraud recoverable by the borrower. Such errors, moreover, would not necessarily void [the mortgage holder’s interest] in collecting on the loan.”

The Fair Debt Collection Practice Act (FDCPA)

The FDCPA prohibits debt collectors, including mortgage holders, from making false representations about the character, amount, or legal status of any debt. To recover for a violation of the FDCPA, a claimant must state, among other things, a “discrete act” that violated claimant’s rights.” The Court held that debtors failed to specify any discrete acts and instead listed rules under the FDCPA and then conclusorily stated that the bank tried to collect a debt larger than what is owed and without the right to do so. “Defendants cannot simply ‘name laws’ that Plaintiff violated. The Court must discount bald statements like these which lack supportive facts.”

The Court dismissed the amended counterclaims with prejudice. In view of the District Court’s decision, foreclosing banks and mortgage holders should look to dismiss any claims asserted against them for alleged violations of PSAs as mortgage debtors do not have standing to assert such challenges.

New Jersey Appellate Division Dismisses Consumer Fraud Act Claim As Outside the Scope of the Consumer Fraud Act Statute

The New Jersey Appellate Division recently reaffirmed that borrowers seeking to evade loan obligations cannot simply rely on bald allegations of predatory lending and unconscionable business practices on the part of the lender and also held that not every loan transaction falls within the scope of the New Jersey Consumer Fraud Act (“CFA”). In *JPMorgan Chase Bank, N.A. v. Gaspar*, Docket No. A-4652-12T4 (N.J. App. Div. Dec. 12, 2014), the New Jersey Appellate Division affirmed the dismissal of counterclaims brought by the defendant, Csaba Gaspar, a borrower, against JPMorgan Chase Bank, N.A. (“Chase”), the lender, for breach of the implied covenant of good faith and fair dealing and violation of the CFA.

Gaspar, a developer, executed a promissory note to Washington Mutual Bank in the amount of \$1.38 million, which was to be secured by two multi-family residential properties located in Jersey City. Two years later, Gaspar defaulted on his monthly installment payments. Thereafter, Chase, who had recently purchased Washington Mutual Bank’s assets (including the loan at issue), filed a foreclosure action in 2009. In the foreclosure action, the Court granted Chase’s motion for summary judgment but transferred Gaspar’s counterclaims against Chase to the Law Division for adjudication. In sum, Gaspar alleged that Chase (1) breached the implied covenant of good faith and fair dealing by refusing to permit a potential buyer to assume the note and mortgage; (2) engaged in predatory lending acts in violation of the CFA; and (3) acted arbitrarily and unreasonably in response to Gaspar’s request for permission to sell the units as condominiums. Chase subsequently filed for summary judgment on the counterclaims, primarily arguing that the record was devoid of any evidence supporting Gaspar’s claims of predatory lending under the CFA and, notwithstanding, that the CFA did not apply to the loan transaction at issue. Chase further argued that the loan documents permitted Chase to refuse to consent to the sale of the units where, as was the case, Gaspar was in default of his payment obligations under the note and mortgage. With respect to the third count, Chase argued that it did not unreasonably refuse to consent to the condominium conversion because Gaspar had not satisfied Chase’s initial requirements, including Gaspar’s failure to pay a processing fee, provide certain documents, and obtain the necessary approvals required under New Jersey’s Condominium Act. Finally, Chase argued that Gaspar’s claims must be

dismissed because Gaspar did not obtain necessary expert testimony regarding the value of the properties to establish his claimed damages.

In affirming the dismissal, the Appellate Division noted that Gaspar could not maintain his breach of covenant of good faith and fair dealing claim premised on Chase's alleged refusal to consent to the sale of condominiums because he was unable to establish he was in a position to sell the individual condominiums at the time of his request. Specifically, Gaspar presented no evidence that he had established the "condominium regime" required under New Jersey's Condominium Act. Additionally, the Appellate Division found that the express terms of the mortgage did not preclude Chase from withholding its consent to the sale of the properties where Gaspar was in default of his payment obligations under the note. Because Gaspar was in default at the time of his request to transfer the properties, Chase was under no obligation, contractual or otherwise, to consent to the transfer.

The Appellate Division also agreed with Chase that the evidence obtained in discovery did not support a finding of predatory lending. The Appellate Division found that the note and mortgage and their terms were commercially reasonable. Moreover, the evidence showed that Gaspar was represented in connection with the loan transaction, he understood at the time he executed the loan documents that Chase's approval was required to sell the units as condominiums, and that he made monthly payments on the note for two years prior to defaulting. As a result, Gaspar's claim that Chase structured the transaction so that Gaspar would inevitably default was without basis in the record. The Appellate Division also found that the loan transaction was outside the scope of the CFA, noting that Gaspar was a sophisticated consumer with significant experience in the development of commercial real estate.

As for Gaspar's third count, the Appellate Division agreed with the trial court that Gaspar failed to comply with the requirements set forth by Chase in order for Chase to consider Gaspar's request to convert the units to condominiums. Gaspar's failure to comply with these requirements, coupled with his failure to demonstrate compliance with New Jersey's Condominium Act, precluded a finding in Gaspar's favor that Chase unreasonably withheld its consent to Gaspar's conversion request. Finally, the Appellate Division agreed that expert testimony was necessary to establish the value of real property despite Gaspar's arguments that there was evidence in the record, based on offers he had received from potential buyers, of the properties' value: "[Gaspar's] statements regarding the offers were not an adequate substitute for the opinion of an expert as to the value of the properties."

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